COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its Own Motion as to the Propriety of the Rates and Charges Set Forth in the Following Tariffs: M.D.T.E. Nos. 14 and 17, filed with the Department on December 11, 1998, to become effective January 10, 1999, by New England Telephone and Telegraph Company d/b/a Bell Atlantic Massachusetts

D.T.E. 98-57

MOTION OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC., TO STRIKE PORTIONS OF CERTAIN BELL ATLANTIC EXHIBITS

AT&T Communications of New England, Inc. ("AT&T") hereby moves the Department of Telecommunications and Energy (the "Department") to strike non-responsive portions of certain Bell Atlantic exhibits. These exhibits consist of responses provided by Bell Atlantic to information requests made by the participants in this docket during pre-trial discovery. Specifically, AT&T requests that the Department strike the non-responsive portions of the responses to DTE-BA 2-38, ATT 2-4, ATT 2-13, ATT 2-22, ATT 3-2, ATT 4-19, ATT 4-33, ATT 4-38, ATT 6-22, ATT 6-31, CTC 1-2, M1 1-3, M1 2-2, RLI-S1-21 and RNK 1-5 (collectively, "The Responses"). The non-responsive portions which AT&T asks to be struck are identified in Attachment A hereto.

Introduction.

During the course of these proceedings, the Department and various participants have propounded information requests to Bell Atlantic. In response to a number of these requests, Bell Atlantic has provided blatantly unresponsive replies. Indeed, instead of answering the questions asked of it, Bell Atlantic--apparently intending from the beginning to introduce such responses into evidence--has taken every opportunity to pad its own case by providing self-serving responses to questions that were not even asked. Bell Atlantic should not be permitted to use the discovery efforts of other parties, in essence, as a pretext for filing "supplemental" testimony.

Argument.

1. Bell Atlantic Should Not Be Allowed To Introduce Its Own Non-Responsive Replies to Record Requests As Exhibits.

In response to a number of record requests made by the participants in this docket, Bell Atlantic has provided wholly non-responsive answers. Instead, Bell Atlantic has used its replies as a means of putting forth information that it failed to introduce in the proper manner--through the written and oral testimony of its witnesses. By providing these self-serving, non-responsive replies, Bell Atlantic has attempted to pad its case in a way which provides AT&T and the other participants little or no opportunity for further discovery or rebuttal.(1) Now, Bell Atlantic has introduced these non-responsive replies as exhibits over AT&T's objections. Although the Department has determined that, as a general matter, Bell Atlantic may introduce its own responses into evidence (See Hearings Transcript, January 28, 2000 pages

1364-1366) it should not permit so much of the responses that are non-responsive to remain in the record. Such a result would simply encourage Bell Atlantic to use every discovery request propounded to it as an opportunity to file additional testimony on whatever subject it pleases. Therefore, the Department should strike The Responses and not allow Bell Atlantic to introduce them as exhibits.

2. Bell Atlantic's Argument That AT&T Should Have Objected To Its Exhibits At The Time That They Were Marked For Identification Is Without Merit.

At the January 28 hearing in this docket, Bell Atlantic attempted to argue that AT&T should have made its objections to Bell Atlantic's exhibits at the time those exhibits were marked for identification. See Hearings Transcript, January 28, 2000 at 1361-1362. This argument is without merit and is contrary to the spirit of the Code of Massachusetts Regulations and the usual practice of the Department. The Code specifically states that "[t]he Department shall follow the rules of evidence observed by the courts when practicable…" 220 CMR 1.10. As a result, in most previous proceedings it has been the Department's practice to hear objections to proposed exhibits at the time that they are moved into evidence, not at the time they are marked for identification. This is the practice followed in the court system and is, as a general rule, the most efficient way to proceed in most Department hearings as well.

Bell Atlantic, however, insists that the Department's practice in the Consolidated Arbitrations supports its position that objections should have been made at the time exhibits were marked for identification. See Hearings Transcript, January 28, 2000 at 1362. As AT&T correctly pointed out at the January 28 hearing, however, in the Consolidated Arbitrations that practice was part of the initial ground rules. See id. Moreover, the deviation in practice for that case was necessitated by the extreme time restrictions imposed by the Telecommunications Act of 1996 combined with the novelty of the subject matter.

Where, as here, this has not been part of the initial ground rules, the Department has followed the practice of having parties make objections at the time exhibits are actually moved into evidence, rather than at the time they are marked for identification. For the Department to alter the ground rules at this late point in the proceedings would be to impose a substantial injustice on AT&T and the other participants. Bell Atlantic's argument is without merit and the Department should disregard it.

Conclusion.

For these reasons, AT&T requests that the Department grant its Motion To Strike Portions of Certain Bell Atlantic Exhibits.

AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

Respectfully submitted,

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Dated: January 31, 2000

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the above document to be served upon the attorney of record for each other party by mail on January 31, 2000.

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1. 1 A classic example is Bell Atlantic's response to AT&T 7-6. Despite the fact that Bell Atlantic had ample opportunity to address the issues earlier, in a manner that would have allowed the other participants an opportunity to reply, Bell Atlantic submitted in response to AT&T 7-6, for the first time, a revised cost study which it intended to become part of the record of these proceedings. Not only was this reply non-responsive to the record request, but by introducing the cost study in this manner, Bell Atlantic also robbed the other participants of a meaningful opportunity to respond. Although AT&T itself intends to introduce this particular response as an exhibit, this is a prime example of what Bell Atlantic has done in response to many record requests. It is this kind of behavior that the Department should prevent by not allowing Bell Atlantic to introduce its own non-responsive record request replies as exhibits.